

NO. 39789-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

HALEY WILSON,

Appellant.

FILED
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DIVISION TWO
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STATE OF WASHINGTON
BY _____

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable David Edwards, Judge

OPENING BRIEF OF APPELLANT

JENNIFER L. DOBSON
DANA M. LIND
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENT OF ERROR

The trial court erred when it did not allow appellant to withdraw her guilty plea.

Issue Pertaining to Assignment of Error

Is a defendant who pled guilty prior to the United States Supreme Court decision in Arizona v. Gant, --- U.S. ---, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009), but who had not been sentenced at the time of that decision, entitled to withdraw her plea under CrR 4.2 and challenge the admissibility of the State's evidence under Gant?

B. STATEMENT OF THE CASE

On November 27, 2008, appellant Haley Wilson was driving through Aberdeen. CP 4. Officer Jeff Weiss observed Wilson activate her high beams, constituting a traffic infraction. He stopped Wilson and asked her for her license. Wilson informed Weiss she did not have a license. After getting some identifying information from Wilson and checking his computer, Weiss discovered Wilson had a suspended driver's license. CP 35-39.

Weiss returned to Wilson's car, asked her to step out, and placed her under arrest. After Wilson was handcuffed and moved away from her car, Officer Weiss "searched the vehicle incident to

arrest.” During the search, he removed Wilson’s purse from the car and discovered a flashlight inside. When Weiss tested the flashlight, it did not work. Weiss and another officer opened up the flash light and discovered what they suspected to be methamphetamine. CP 35-39.

On December 1, 2008, the Grays Harbor County prosecutor charged Wilson with one count of possession of a controlled substance. CP 1-2. On February 17, 2009, Wilson entered a guilty plea. CP 10-18.

On April 21, 2009, prior to Wilson’s sentencing, the Supreme Court issued its opinion in Gant changing existing law regarding the legality of searches incident to arrest. On June 26, 2009, Wilson moved to withdraw her guilty plea. CP 35-39.

On August 3, 2009, the trial court heard argument regarding the motion.¹ Defense counsel asserted Wilson should be permitted to withdraw her plea under CrR 4.2 because the case was not yet final and, thus, it was a manifest injustice not to permit her to challenge the evidence seized in violation of Gant. RP 5-10. The State argued the case was final and, thus, Gant did not apply. RP

¹ This was a joint hearing in which several defendants raised the same issue.

14-15. The trial court ruled the Gant decision did not have any effect on the validity of Wilson's plea because, it did not affect the truth-finding aspects of the plea and, thus, there was no manifest injustice. RP 15-19.

On August 17, 2009, the trial court entered a felony judgment and sentence. RP 25-33. Wilson timely appealed. RP 34.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT DENIED WILSON'S MOTION TO WITHDRAW HER PLEA.

Appellant's case was not yet final when the United States Supreme Court changed existing search and seizure law in Arizona v. Gant, 129 S.Ct. 1710. The Gant holding fundamentally altered the legality of the search of Wilson's car and purse. Hence, the trial court's refusal to permit Wilson to withdraw her plea under CrR 4.2(f) in order to raise a Gant challenge constituted an abuse of discretion which resulted in a manifest injustice.

Under CrR 4.2(f), a defendant may withdraw a plea of guilty "whenever it appears that the withdrawal is necessary to correct a manifest injustice." A "manifest injustice" is one "that is obvious, directly observable, overt, [and] not obscure." State v. Taylor, 83

Wn.2d 594, 596, 521 P.2d 699 (1974). A post-guilty plea, pre-sentence change in Supreme Court precedent bearing on a defendant's legal innocence has been found to constitute an obvious injustice and a just reason for permitting the withdrawal of a plea. See, e.g., United States v. Ortega-Ascanio, 376 F.3d 879 (9th Cir.2004); United States v. Presley, 478 F.2d 163, 167-68 (5th Cir.1973).

There is no question Gant constitutes a change in existing Fourth Amendment law that directly impacts the admissibility of the State's evidence against Wilson. In Gant, the United States Supreme Court addressed the search incident to arrest exception to the warrant requirement of the Fourth Amendment. Gant rejected the reading of New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) – given by numerous lower courts – as allowing “a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search.” Gant, 129 S.Ct. at 1718. The Supreme Court instead held “[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time

of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.” Gant, 129 S.Ct. at 1723.

The facts in Gant are similar to those here. Wilson was not within reaching distance of the passenger compartment of her car or her purse at the time of the search, and there was no reason to believe that the car or purse contained evidence relating to the offense for which she was arrested, driving with a suspended license. Therefore, under Gant, absent other legal support for the search, the officer's search of Wilson's car and purse was unlawful and the evidence is newly challengeable. See, e.g., State v. Harris, 154 Wn. App. 87, 92, 224 P.3d 830 (2010).

The salient question here, however, is whether Gant applies to this case given the fact Wilson had already pled guilty. Generally, United States Supreme Court decisions announcing new constitutional rules governing criminal prosecutions apply retroactively to all criminal cases not yet final. Griffith v. Kentucky, 479 U.S. 314, 322, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987); State v. McCormack, 117 Wn.2d 141, 144-45, 812 P.2d 483 (1991). Thus, finality is the central consideration.

Even though Wilson had already entered a guilty plea at the time Gant was decided, her case was not final because she had not

yet been sentenced. A case is “final” when the judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari has elapsed. In re Skylstad, 160 Wn.2d 944, 950, 162 P.3d 413 (2007); In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 327, 823 P.2d 492 (1992) (quoting Griffith, 479 U.S. at 321 n. 6). “Final judgment in a criminal case means sentence. The sentence is the judgment.” Berman v. United States, 302 U.S. 211, 212, 58 S.Ct. 164, 82 L.Ed. 204 (1937).

Given the fact that Wilson’s case was not final and given the obvious application of Gant, Wilson had adequate grounds under CrR 4.2(f) to withdraw her plea and assert her legal innocence via a suppression challenge. Hence, the trial court’s denial of Wilson’s motion to withdraw her plea was an abuse of discretion resulting in a manifest in justice.

In response, the State may argue Wilson effectively waived her right to raise this issue when she failed to move to suppress the evidence before entering her plea. This argument should be rejected because the waiver doctrine does not apply where one cannot anticipate a change in existing law.

Failure to raise a suppression challenge in the trial court does not constitute waiver of a Gant challenge if the case is not final. Harris, 154 Wn. App. at 99. In Harris, a panel of this Court was asked to consider whether Harris could raise a Gant challenge on direct appeal despite the fact that he had not previously moved to suppress the evidence. Harris held the failure to move to suppress under pre-Gant law does not waive the defendant's right to take advantage of Gant on appeal. Harris, 154 Wn. App. 99; see also, McCormick, 216 P.3d at 476-77.²

² Appellant acknowledges this Court is split on the waiver issue. In State v. McCormick, Judges Houghton (writing), Armstrong (concurring), and Penoyar (concurring) held that defendants may raise an admissibility of evidence challenge on appeal without having done so in the trial court, following a change in the law under Gant. McCormick, 152 Wn. App. 536, 540, 216 P.3d 475 (2009). The McCormick opinion called into question another panel's decision in State v. Millan, 151 Wn. App. 492, 212 P.3d 603 (2009), which denied a similar challenge on appeal finding it waived. Following McCormick, in State v. Harris, another panel, (Judges Armstrong (writing), Penoyar (concurring), and Quinn-Brintnall (dissenting)), declined to hold that a defendant waived his right to challenge a search under Gant by failing to bring a then meritless motion to suppress before the pre-Gant trial. Harris, 154 Wn. App. 87, 98-99, 224 P.3d 830 (2010). In State v. Burnett, --- Wn. App.2d ---, --- P.3d ---, 2010 WL 611498 (2010), a third panel, (Judges Penoyar (writing), and Houghton and Van Deren, concurring), followed McCormick. More recently, in State v. Nyegaard, --- P.3d ---, 2010 WL 610764 (2010), a split panel followed Millan. So far, Judges Quinn-Brintnall, Bridgewater, and Hunt have followed the Millan analysis and Judges Houghton, Armstrong, Van Deren, and Penoyar have followed the McCormick and Harris analyses.

Harris is consistent with existing case law addressing the waiver doctrine. Although the Washington Supreme Court has held a defendant may expressly waive her right to challenge the admission of evidence seized in a warrantless search if she withdrew a motion to suppress before trial, State v. Valladares, 99 Wn.2d 663, 672, 664 P.2d 508 (1983), that holding does not extend to situations where there is a change in existing law.

Division Three correctly distinguished Valladares in State v. Rodriguez, 65 Wn. App. 409, 417, 828 P.2d 636 (1992). Even though Rodriguez withdrew his pretrial motion to suppress, Division Three allowed him to raise the issue on appeal because of a change in existing law. Division Three found no Valladares waiver because, at the time of trial, the parties and the court would have reasonably relied on a Court of Appeals decision that was subsequently reversed, and because none could have anticipated the change in law. Rodriguez, 65 Wn. App. at 417; accord, Harris, 154 Wn. App. 94-95.

The same reasoning applies here. The change of law ushered in by Gant was not known to Wilson at the time she evaluated whether to plead guilty. Neither the parties nor the court could have anticipated the search incident to arrest that occurred in

Wilson's case would be deemed illegal. Thus, she could not have intelligently and intentionally relinquished her right to challenge the legality of the search under Gant. See, Harris, 154 Wn. App. at 95-96 (citations omitted). Given these circumstances, the waiver doctrine does not apply.

The State may also argue the good-faith exception should apply, citing State v. Riley, ___ Wn. App. ___, 225, P.3d 462, 467-68 (Division I, 2010). This argument has been rejected by this court, however, because such a holding would conflict with the rule granting retroactive application of new constitutional rules in criminal cases. Harris, 154 Wn. App. at 101 (citations omitted).

In conclusion, Wilson should have been permitted to withdraw her plea under RCW 4.2(f), because there was a change of existing Fourth Amendment Law before her case was final, and because none of the parties or court could have anticipated the change at the time she decided to enter her plea. The trial court's denial of Wilson's motion was an abuse of discretion resulting in a manifest injustice. Accordingly, appellant asks this court to reverse the trial court, permit Wilson to withdraw her plea, and remand for appropriate proceedings.

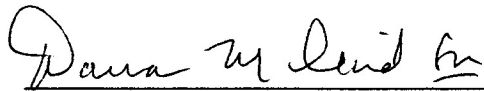
D. CONCLUSION


Appellant respectfully asks this Court to reverse the trial court and permit her to withdraw her plea.

Dated this 7th day of April, 2010.

Respectfully submitted

NIELSEN, BROMAN & KOCH


JENNIFER L. DOBSON, WSBA 30487


DANA M. LIND, WSBA 28239
Office ID No. 91051
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON

Respondent,

vs.

HALEY WILSON,

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COA NO. 39789-7-II

DECLARATION OF SERVICE

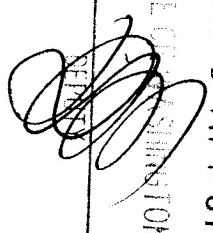
I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7TH DAY OF APRIL 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WILLIAM LERAAS
GRAYS HARBOR COUNTY PROSECUTING ATTORNEY
102 W. BROADWAY AVENUE
ROOM 102
MONTESANO, WA 98563

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF APRIL 2010.

x Patrick Mayovsky

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STATE OF WASHINGTON
By 

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.

1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. LIND
JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT

OF COUNSEL
K. CAROLYN RAMAMURTI
JARED B. STEED

State V. Haley Wilson

No. 39789-7-II

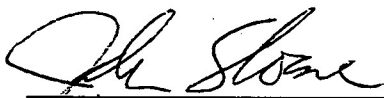
Certificate of Service by Mail

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Haley Wilson
801 N Rice Street
Aberdeen, WA 98520

Containing a copy of the opening brief of appellant, re Haley Wilson.
Cause No. 39789-7-II, in the Court of Appeals, Division II, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the
foregoing is true and correct.



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Office Manager
Nielsen, Broman & Koch

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